

STATE OF MICHIGAN  
IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN  
Plaintiff-Appellee,

vs.

TERRENCE MITCHELL BRUCE,  
Defendant-Appellant.

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Lower Court No. 2015-4687-FH  
Court of Appeals No. 331232  
MI Supreme Court No. 156827

**DEFENDANT-APPELLANT'S BRIEF OPPOSING**  
**PLAINTIFF-APPELLEE'S APPLICATION FOR LEAVE TO APPEAL**

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Date: August 11, 2016

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## STATEMENT OF JURISDICTION

The Plaintiff-Appellee has filed an application for leave to appeal after a decision of the Michigan Court of Appeals on October 5, 2017.

Plaintiff-Appellee will argue that this Honorable Court has jurisdiction pursuant to Const 1963, art 6, §4; MCL 600.212; MCL 600.215(3); and MCR 7.301(A)(2) to review by appeal a case after a decision by the Court of Appeals. However, given the Court of Appeals issued its opinion in this matter on October 5, 2017 and the application was filed on November 30, 2017, the application was not timely filed within 28 days of the Court of Appeals' decision, as required by MCR 7.302(C)(2).

## STATEMENT OF QUESTIONS PRESENTED

I. DID THE TRIAL COURT COMMIT LEGAL ERROR BY DENYING DEFENDANT'S MOTION FOR A DIRECTED VERDICT OF ACQUITTAL ON THE MISCONDUCT IN OFFICE CHARGE?

The trial court answered "no."

Defendant - Appellant answers "yes."

Plaintiff - Appellee answers "no."

Standard of Review: Whether an individual qualifies as a public officer in a misconduct in office prosecution is a matter of law that is reviewed de novo. People v Coutu, 459 Mich 348, 494 (1999).

II. ASSUMING ARGUENDO THAT DEFENDANT QUALIFIES AS A PUBLIC OFFICIAL FOR PURPOSES OF THE MISCONDUCT IN OFFICE OFFENSE, DID HIS ACTIONS REACH THE LEVEL OF CORRUPTION TO THE EXTENT THAT A REASONABLE JURY COULD HAVE FOUND HIM GUILTY BEYOND A REASONABLE DOUBT OF MISCONDUCT IN OFFICE?

Defendant - Appellant answers "no."

Plaintiff - Appellee will answer "yes."

Standard of Review: The Court of Appeals decides a sufficiency of evidence issue as a matter of law that is reviewed de novo. People v Hampton, 407 Mich 354 (1979).

### STATEMENT OF FACTS

In 2015, The Michigan Attorney General's Office lodged criminal charges in Jackson County against Terence Bruce (Defendant) and Stanley Nicholson. Both Defendant and Nicholson were employed in 2014 as federal border patrol officers. Assigned to assist the Homeland Security Team (consisting of state police officers and local police officers), in December 2014, both men were charged with larceny in a building, MCL 750.360, and misconduct in office, MCL 750.505, as a result of their having taken property without permission, during their execution of a narcotics search warrant at two residences in Jackson County.

Following a three day-jury trial, the jurors, on September 23, 2015, rendered verdicts acquitting Defendant and Nicholson of larceny in a building, but convicting them of misconduct in office (TR, III, p 124). Judge Thomas Wilson, on December 3, 2015, imposed probationary sentences, without any jail term, against both men (Tr, IV, pp 6-8).

The prosecution presented eleven witnesses: ten police officers and the complaining witness, Benjamin Scott. Each defendant acknowledged at trial that they he had taken an item from the residence, which had been searched by the Homeland Security Team (Defendant had taken a chair, described as a stool with wheels (Tr I, p 224), whereas Nicholson had taken an old thermometer). {Tr II, pp 174 -176; Tr III, pp 32 -34}. Nevertheless, both defendants asserted at trial that they lacked the mens rea to commit larceny and that their acts did not give rise to the common law crime of misconduct in office.

On December 23, 2014, the Home Security Team (HST) and the Jackson Narcotics Enforcement Team (JNET) procured a search warrant to search two residences owned by Benjamin

Scott on Ann Arbor Road in Lenoi Township, Jackson County, to search for marijuana and related property (Tr I, pp 127 - 130). Information needed for the drafting of a search warrant at those two properties emanated from a traffic stop of Benjamin Scott on December 23 (Tr II, pp 150 - 151).

A myriad of state troopers and police officers, assisted by Defendant and Nicholson, who were members of the federal border patrol assigned to work with JNET and HST, entered the two residences searching for marijuana and evidence of crimes associated with the crime of distribution of marijuana (Tr I, pp 127 -132; (Tr II, pp 170 -171); (Tr II, pp 191 -197). Items taken by the teams were tabulated (Tr, II, p 193). Defendant removed a chair from one of the homes, and Nicholson removed a thermometer (Tr III, pp 33 -34).

Nicholson defended the larceny charge at trial by claiming that he believed the item constituted "junk," having no value (Tr III, pp 32 -34). Defendant similarly denied wrongdoing, believing that he could take the chair on account of its lack of value (Tr III, p 80; Tr II, pp 174 - 176). On the following day, Defendant sent a text to one of the officers involved in the execution of the search warrant, and, thereafter, he returned the chair to one of the state or city officers connected to the search (Tr II, p 176). As previously indicated, both men were found not guilty of larceny in a building.

Evidence at trial unequivocally displayed that neither Defendant nor Nicholson had been employed as a police officer, or certified as a police officer, in Michigan. Neither man had posted a bond or had taken an "oath of office" to assist the JNET and HST officers. At the conclusion of the prosecution's case, the attorneys for Defendant and Nicholson moved for directed verdicts on both charges, and the trial judge denied those motions (Tr III, pp 4 -7).

Defendant contended, through his attorney, that as a federal border officer, who had not taken an oath to work with the troopers and police officers, he did not qualify as a public official under the common law crime of misconduct of office (Tr III, pp 85 -87).

On October 5, 2017, the Michigan Court of Appeals reversed Defendant's conviction for Misconduct in Office, finding that Defendant did not qualify as a public officer. The Michigan Attorney General has filed an application for leave to appeal the Michigan Court of Appeals' decision to reverse Defendant's conviction on November 30, 2017 with this Honorable Court.



### ARGUMENT ONE

#### **THE TRIAL JUDGE COMMITTED CLEAR LEGAL ERROR BY DENYING DEFENDANT'S MOTION FOR A DIRECTED VERDICT OF ACQUITTAL ON THE MISCONDUCT IN OFFICE CHARGE**

The proofs at trial divulged that Defendant, a federal border officer, had not been employed by the State of Michigan, had not been certified as police officer in Michigan, and did not take an oath to serve as a peace officer in Michigan. On a short-term basis, he and two other federal border officers collaborated with the Homeland Security Team and the Jackson County Enforcement Team to combat illegal drug possession and sales near the area of interstate highways in the western area of Michigan.

The crime of misconduct in office, a five-year felony, is not statutorily based; rather, it is a recognized common law crime in Michigan. People v Coutu (On Remand), 235 Mich App 695, 705; 599 NW2d 556 (1999). According to People v Carlin (On Remand), 239 Mich App 49, 64 (1999); 607 NW2d 773 (1999), the elements of the crime of misconduct in office are (1) the defendant is a public officer; (2) the misconduct occurred during the exercise of the duties of his office, or under the color of the office; and (3) the wrongful acts constitute corrupt behavior, used in the sense of depravity, perversion, or taint. Coutu, supra, at 706.

The seminal issue in this appeal is whether Federal Border Patrol Officer Terence Bruce qualified as a "public officer" when he collaborated with troopers and officers in executing a search warrant on December 23 and 24, 2014, in Jackson County.

The Michigan Supreme Court, in People v Coutu, 459 Mich 348, 354; 589 NW2d 458 (1999), recognized the importance of defining a "public officer" in the misconduct of office context, identifying the five indispensable elements necessary for an individual's position to

qualify as a public officer:

“(1) It must be created by the Constitution or by the legislature or created by a municipality or other body through authority conferred by the legislature; (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) the powers conferred, and the duties to be discharged, must be defined, directly or impliedly, by the legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power other than the law, unless they be those of an inferior or subordinate office, created or authorized by the legislature, and by it placed under the general control of a superior officer or body; (5) it must have some permanency and continuity, and not be only temporary or occasional.”

The Supreme Court also noted that the existence of an “oath and bond requirements” may be helpful in making the determination of whether a person is a public officer. Coutu, at 355.

The prosecution’s proofs did not contain any evidence showing that Defendant had taken an oath of office as a Michigan police officer, or that he had posted a bond of any kind. He clearly is not an employee of any public agency or office in Michigan. He is a federal, not a state, public officer. In MCL 764.15d, the Legislature has recognized that a federal law enforcement officer has state powers of arrest, but that statute does not denominate him or her as a state border patrol officer as a state officer. If the Legislature so chooses, it can classify federal officers as state officers. By not doing so, the Legislature has not given a federal officer the title and power of a state officer. Likewise, the fifth criterion, that the position of federal border officer, argued by the prosecutor to be that of a public officer, has to have some permanency and continuity, and not only temporary or occasional, was not satisfied the prosecution’s proofs.

In an unpublished opinion decided in 2016, People v Sledge and Collins, No. 329626

and No. 329686, the Court of Appeals applied the Supreme Court's Coutu decision in deciding whether Steven Collins qualified as a public officer in order for the Wayne County Prosecutor's Office to charge him with the crime of misconduct in office. Collins and Sledge had been indicted by a state grand jury with regard to their alleged misconduct in the management of the county jail project. Collins had been indicted based on his role as an assistant corporation counsel.

The trial court had dismissed the misconduct in office charge against Collins, based on its conclusion that Collins was not a public officer. The Michigan Court of Appeals upheld the trial judge's legal finding that Collins did not qualify as a public officer, because neither the Legislature nor the Wayne County Charter had established the position of assistant corporation counsel as a public officer. The Court of Appeals held, "Accordingly Collins, in his role as assistant corporation counsel, is properly characterized as a public employee and not a public officer. Because he was not a public officer, the trial court did not err in dismissing the misconduct in office charges against him." (Slip Opinion, p 7.)

Based on the Coutu and Collins cases, as the Court of Appeals found in this case, the trial judge should not have submitted the misconduct in office charge to the jurors. He, instead, should have granted Defendant's motion for a directed verdict of acquittal on that charge (or granted Defendant's pretrial motion to dismiss that charge on September 11, 2015). Accordingly, Defendant prays that this Honorable Court deny the prosecution's application for leave to appeal given that the application was not timely filed within 28 days of the Court of Appeals' decision, as required by MCR 7.302(C)(2), or, in the alternative, in deciding this question of law issue under a de novo standard, find that the Court of Appeals correctly found that the trial judge committed

legal error, requiring the misconduct in office conviction to be vacated.

## ARGUMENT TWO

**ASSUMING ARGUENDO THAT DEFENDANT CAN BE CONSIDERED A PUBLIC OFFICER, HIS ACTIONS IN STEALING ONE ARTICLE OF PROPERTY, OF INSUBSTANTIAL VALUE, DOES NOT CONSTITUTE THE CRIME OF MISCONDUCT IN OFFICE**

In the first issue, Defendant asserts that he should not have faced charges on a misconduct in office offense, because he is not a public officer, a required element under People v Coutu, 459 Mich 348; 589 NW2d 458 (1999). In the event this Court decides to the contrary, the prosecution's case is insufficient, as a matter of law, under Jackson v Virginia, 443 US 307 (1979), and should not have been submitted to the jurors.

At most, Defendant purloined a used chair while involved in the execution of a search warrant. Shortly thereafter, he had misgivings about his actions.. He then contacted a state or local officer involved in the search, gaining instructions to return the chair, which he did on December 30, 2014 (Tr II, p176). Although no witnesses testified about the value of the chair, the article did not possess great value to Defendant or any other person.

People v Coutu (On Remand), 235 Mich App 695, 705; 599 NW2d 1999), enunciated the elements of the common law offense of misconduct in office: (1) the person must be a public officer, (2) the conduct must be in the exercise of the duties of the office or done under the color of the office, (3) the acts were malfeasance or misfeasance, and (4) the acts must be corrupt behavior.

Appellate cases addressing the misconduct in office charge revolve around serious crimes, such as an officer seriously injuring a suspect {People v Milton, Unpublished Opinion, Case No. 234080 (2003)}, fraudulent conduct, {People v Sledge, Unpublished Opinion, Case No.

329626 (2016)}, and deputy sheriffs granting preferential treatment to work-release inmates in exchange for gifts and favors {People v Coutu, 459 Mich 348 (1999)}.

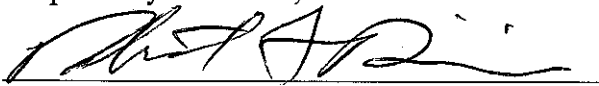
Does the crime of larceny in a building, committed spontaneously where the property has minimal value, constitute corrupt behavior? Corruption is defined in People v Milton, supra, as “depravity, corruption, or taint.” (Slip Opinion, p2). If larceny in a building, pertaining to the circumstances of this case, amounts to depravity, corruption, or taint, then the common law crime of misconduct in office would apply to any crime, misdemeanor or felony, regardless of its seriousness.

Based on the foregoing recitation, the prosecution’s evidence is insufficient as a matter of law, People v Hampton, 407 Mich 354; 285 NW2d 284 (1979), to justify the rendering of a guilty verdict by a reasonable fact finder. Accordingly, Defendant prays that this Honorable Court should deny the prosecution’s application for leave to appeal given that the application was not timely filed within 28 days of the Court of Appeals’ decision, as required by MCR 7.302(C)(2), or, in the alternative, uphold the ruling of the Court of Appeals that Defendant’s misconduct in office conviction should be vacated.

**RELIEF REQUESTED**

Defendant-Appellant respectfully requests that this Honorable Court deny Plaintiff-Appelle's application for leave to appeal the decision of the Michigan Court of Appeals dated October 5, 2017 or, in the alternative, uphold the decision of the Michigan Court of Appeals dated October 5, 2017.

Respectfully submitted,



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Date: December 19, 2017

PEOPLE OF THE STATE OF MICHIGAN,  
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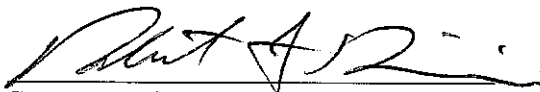
Lower Court No. 2015-4687-FH  
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TERRENCE MITCHELL BRUCE,  
Defendant - Appellant.

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**PROOF OF SERVICE**

On December 19, 2016, Robert A. Piraino e-filed this Michigan Supreme Court Brief in Opposition to Application to Leave and On The Issues Presented, copies of which by e-file to be severed upon and/or made available to the parties of record on file with the Michigan Supreme Court e-filing service.



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Original date: December 19, 2016